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IN THE

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,
Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,
Respondents.

On Writ of Certiorari to theUnited States Court of Appeals for the Ninth Circuit

BRIEF OF MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") is a securities broker-dealer. As a financial custodian of millions of accounts in the names of individuals, families, retirement plans and corporate and other entities, Merrill has an interest in the continuing viability of the interpleader process as a mechanism for resolving disputes between competing claimants for assets (including assets that may at some point be claimed by foreign sovereigns or their instrumentalities) without exposing the custodians of those assets to multiple liabilities. The equitable balancing test of Federal Rule of Civil Procedure 19(b) requires courts to consider the interests of the stakeholder-plaintiff in not dismissing an interpleader on the grounds that a claimant who is unavailable is an indispensable party. As set forth below, Merrill believes that the standard proposed by Petitioners gives undue weight to the interests of foreign sovereign claimants in foreclosing use of the interpleader process by innocent stakeholders and thus threatens the viability of the interpleader process.

Merrill initially filed this interpleader action in 2000 in its capacity as a disinterested stakeholder with no claim against the assets at issue and no interest in their ultimate disposition. Merrill has

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3, *amicus curiae* states that petitioners and respondents have consented to the filing of this brief, and written consents have been filed with the Court.

since been discharged by the district court and is no longer a party to this action. Merrill remains neutral as to the rightful ownership and disposition of the assets, and takes no position as to whether the Court should affirm the Ninth Circuit or remand for further consideration, and no position as to whether petitioners have the right to appeal. Merrill files this brief solely to address the adverse consequences to it as stakeholder if this action is dismissed.

Specifically, Merrill's paramount interest is in a final resolution of this dispute that avoids duplicative litigation or inconsistent claims against Merrill. Dismissal would put Merrill back where it started: holding assets subject to dispute without any practical means available to resolve the competing claims. Petitioners the Republic of the Philippines ("the Republic"), and the Philippine Presidential Commission On Good Government ("PCGG")[2] – who created this impasse by successfully asserting sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") – would still need to file suit in a U.S. court to obtain the relief PCGG seeks. By doing so, PCGG would waive its immunity under the FSIA's waiver and counterclaim provisions, 28 U.S.C. §§ 1605(a)(1) & 1607(b)-(c), thus permitting Merrill to initiate a *new* interpleader in which PCGG would then participate. But such a 'do-over' would come at the cost of delay and duplication of this entire process, which has already consumed more than seven years of litigation. Moreover, in that event, Merrill would face continuing uncertainty while it awaited such a filing by a party that has known of its

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[2] Because PCGG is the instrumentality charged with prosecuting the Republic's interests and those interests are identical, this brief will refer to them collectively as "PCGG."

interests in the subject assets for two decades and has yet to file suit in the United States.

By contrast, a final judgment by the district court binding on the remaining parties is adequate to relieve Merrill of responsibility for the assets and formally discharge it from liability to any claimant other than PCGG. That would end the dispute unless and until PCGG were to file suit against Merrill. As discussed below, such a lawsuit would be subject to dismissal on numerous legal and equitable grounds, and thus PCGG could not seek money damages against Merrill.

While this is an imperfect resolution, it is the least inequitable to the parties. Merrill would have a discharge and the burden of defending only a single potential lawsuit of dubious merit. The other claimants, including petitioners Arelma Inc. ("Arelma") and the Philippine National Bank ("PNB"), have had their day in court and were not prejudiced by the absence of PCGG. And any prejudice to PCGG would be of its own making, having sat out the interpleader on sovereign immunity grounds in favor of relying on the right to institute affirmative litigation against a party who has done nothing but comply with all applicable court orders and follow the course outlined in the Federal Rules for resolving precisely this kind of dispute.

STATEMENT OF THE CASE

This case arises from a dispute over the ownership of assets held in a brokerage account at Merrill in New York in the name of Arelma, a Panamanian corporation. Pet. App. 43a, 45a. The Arelma account was opened in 1972 with a deposit in the amount of $2 million, which had grown to $35 million by the time Merrill filed this action in 2000. *Id.* at 45a-46a.

Merrill claims no interest in these assets, and accordingly instituted an interpleader in the United States District Court for the District of Hawaii to permit the various claimants to come forward and assert their own claims.[3]

In understanding the competing claims, it is important to distinguish between (1) ownership and control of shares of Arelma (the "Arelma shares") and (2) the assets held in Arelma's name at Merrill (the "Arelma assets"). It is the Arelma assets that were held by Merrill and were deposited by Merrill with the district court pursuant to 28 U.S.C. § 1335(a)(1).[4] Thus, the question before the district court was who was entitled to the Arelma assets: (a) Arelma and/or the party controlling Arelma, or (b) a party with a valid claim against Arelma. In the absence of a valid claim against Arelma, Arelma's authorized corporate representative would ordinarily have the right, as the holder of the account, to direct Merrill concerning how to dispose of its assets. However, because the shareholders of a corporation own the corporation and not its assets,[5] Merrill could not safely direct the assets to the corporation's shareholders in the face of

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[3] Merrill was discharged by the district court on July 3, 2003 (JA 22-24) and was no longer a party when the district court issued its findings of fact and conclusions of law. Merrill did not participate in the subsequent appeal to the Ninth Circuit.

[4] Federal law provides both for statutory interpleader under 28 U.S.C. § 1335 and "Rule interpleader" under Rule 22 of the Federal Rules of Civil Procedure. While Merrill invoked both the statute and the Rule, it is § 1335 that provides federal subject matter jurisdiction for interpleader actions where there is minimal diversity, which is present here.

[5] This is a "basic tenet of American corporate law," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003), and the claimants have not cited Panamanian law to the contrary.

a valid claim against the corporation or the assets themselves. Moreover, Merrill could not safely follow the direction of Arelma's authorized corporate representative if there were a significant dispute over who had that authority. Accordingly, the district court needed to determine the ownership of the Arelma shares, but as an ancillary (not necessarily dispositive) question to its determination of the ownership of the Arelma assets.

While many claimants were named in the interpleader, only five remain relevant:

1. PCGG contends that the Arelma assets were misappropriated from the Philippine government by then-President Ferdinand Marcos, and therefore that any subsequent transfers of those assets were void *ab initio* under Philippine law. Pet. Br. at 1-3. After the fall of the Marcos government in 1986, the Republic established its instrumentality PCGG to pursue and recover assets misappropriated by the Marcos family. Early on in this process, the Republic and PCGG identified Arelma as holding assets potentially recoverable by PCGG, and in litigation with Marcos in 1987 the Republic obtained a court order in New York freezing the Arelma account at Merrill. *See* Pet. App. 47a. PCGG has pursued affirmative litigation in both Switzerland and the Philippines to recoup assets from Marcos, but Merrill has never been a party to any of those actions.

While the claimants continue to dispute precisely when and how these foreign lawsuits identified Arelma and its assets,[6] the Arelma shares have been held in escrow on PCGG's behalf since 1995 at PNB, which obtained them from Swiss authorities. Pet.

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[6] *Compare* Pet. at 4-5 & Pet. Cert. Reply at 7 n.6, *with* Resp. Cert. Opp. at 4 & n.3.

App. 7a, 46a, 49a-50a. PCGG represents that it is presently pursuing litigation in the Sandiganbayan, a Philippine court charged with handling such cases. Pet. Br. at 6. A decision of the Sandiganbayan would be appealable to the Philippine Supreme Court. *See id.* at 5-6.

On May 8, 2000, PCGG notified Merrill that instructions concerning the Arelma assets would be forthcoming. CA9 E.R. 0285. On July 12, 2000, PCGG requested that Merrill transfer the Arelma assets to an escrow account with PNB. *Id.* at 0162. Merrill responded by letter on July 19, citing competing claims over the ownership of the Arelma shares as a basis for refusing PCGG's request. *Id.* at 0163-65.

The Ninth Circuit in 2002 concluded that PCGG was a necessary party and at PCGG's request briefly stayed this action pending the resolution of the litigation in the Sandiganbayan, a move Merrill did not oppose at the time as an alternative to dismissal. Pet. App. 39a-42a.[7] More than five years later, however, there has been no decision from the

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[7] Rule 19(a) deems a party's joinder to be "required" (also referred to as a "necessary party") if, among other things:

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B). All cites to Rules 19 and 22 herein are to the revised Rules adopted as of December 1, 2007. The revisions to the rule were technical and "intended to be stylistic only." Fed. R. Civ. P. 19 & 22, advisory committee's notes (2007).

Sandiganbayan. It is Merrill's understanding that the Philippine litigation is solely between PCGG and the Marcos estate and Marcos-related interests. Pet. at 24 n.10, 27; Pet. App. 56a, 59a. The Philippine courts have asserted that they have *in rem* jurisdiction over the Arelma shares (*see* Pet. at 18 n.7; Pet. App. 61a), but because the Arelma assets are in the United States, any judgment against the Marcos interests in the Sandiganbayan would be entered without *in rem* jurisdiction over the Arelma assets and without the participation of any of the parties to this litigation.

2. PNB's only claim to the Arelma assets is in its role as escrow agent for the Arelma shares. Pet. Br. at 4-9 & n.7. PNB and Arelma both participated in the interpleader litigation, while objecting to the absence of PCGG. *See* Pet. App. 50a-54a; Pet. Br. at 7-8 & n.7. The district court found that PNB's claim to the Arelma assets, to the extent it could exercise the rights of a shareholder of Arelma, was derivative of Arelma's claim and rejected it on that basis. Pet. App. 52a.

3. Arelma's claim to the Arelma assets is based on the corporation's direct ownership of the account. The district court, applying federal common law, disregarded the corporate form of Arelma on the grounds that it was an *alter ego* of Ferdinand Marcos, and concluded that its assets could be used to satisfy judgments against Marcos' estate. Pet. App. 51a-52a, 54a.

4. Respondent Mariano Pimentel represents the interests of a class of victims of human rights abuses by the Marcos regime (the "Pimentel Class"), which obtained a judgment against the Marcos Estate in the District of Hawaii in 1996. Pet. App. 53a. The Pimentel Class filed a lawsuit against Merrill in that

court, seeking the assets in the Arelma account to satisfy that judgment, on September 6, 2000. CA9 S.E.R. 01-05. That lawsuit, combined with the other claims against the Arelma assets or for control of Arelma, led Merrill to file this action five days later. The district court awarded the Arelma assets to the Pimentel Class on the *alter ego* theory, as judgment creditors of the Marcos estate. Pet. App. 53a-54a.

5. Respondents the Estate of Roger Roxas and Golden Budha Corporation (collectively, "Roxas") also claimed the Arelma assets as individual victims of the Marcos regime. The district court rejected those claims on the theory that Roxas's judgment was against Marcos's wife Imelda, not Marcos himself. Pet. App. 54a.

Merrill takes no position on the propriety of the district court's disposition. The outcome of Petitioners' appeal, however, presents two choices: dismissal of the entire action, or a judgment by the district court binding on the parties to the interpleader. In either event, Merrill is exposed to the possibility of further litigation by PCGG, but a dismissal would also expose it to litigation by the other claimants, without a mechanism to resolve the claims in a single forum.

SUMMARY OF ARGUMENT

1. Rule 19(b) establishes a four-factor test of "equity and good conscience" for determining whether a case should proceed in the absence of a party deemed by the court to be "necessary" under Rule 19(a). The standard for evaluating this and other Rule 19(b) factors is abuse of discretion.

In an interpleader action, the fourth factor, "whether the plaintiff would have an adequate

remedy if the action were dismissed for nonjoinder," refers to the interest of the stakeholder who files the action rather than the interests of competing claimants. Here, Merrill would not have an adequate remedy if this action were dismissed after seven years of litigation: it would be left without direction as to the proper disposition of the Arelma assets, and without protection from duplicative litigation over those assets. The absence of any alternative forum to resolve all the competing claims is a powerful factor counseling against dismissal, and doubly so on appeal from a fully litigated judgment.

2. The first Rule 19(b) factor is "the extent to which a judgment rendered in the [necessary party's] absence might prejudice that person." The Court should not accord dispositive weight to PCGG's sovereign status; instead, the potential prejudice to PCGG should be evaluated as a practical matter, taking full account of the equitable considerations embedded in the Rule 19(b) factors. In weighing those factors, a court should examine the nature of the interests asserted by a foreign sovereign and the available alternatives. Congress, in enacting Rule 19(b), the interpleader statute and rules, and the FSIA, did not provide any unique exception from the usual Rule 19(b) analysis for actions in which a foreign sovereign is a necessary party. A preliminary inquiry touching on the merits of the case is no different from, and no more intrusive than, other preliminary inquiries ordinarily permitted or required under the FSIA.

Because this case involves a dispute over assets located in the United States, PCGG would need to file suit affirmatively in U.S. courts in order to recover any assets. Thus, the relevant prejudice here is not to PCGG's immunity from suit *per se*, but to PCGG's

right to use that immunity as both a sword and a shield to choose the timing and venue in which it may file suit in U.S. courts. If PCGG did file such a suit, it would then waive its immunity from joinder in an interpleader action. Accordingly, for purposes of the first Rule 19(b) factor, PCGG should be held to the consequences of deliberately choosing not to participate in an interpleader when it had the opportunity. The equities do not and should not favor such a litigant.

Prejudice to PCGG is further lessened because certain of its theories of relief are derivative of Arelma's, and are properly foreclosed, while any claims it could have brought directly against Merrill in U.S. courts would in any event be time-barred. To the extent that PCGG would be prejudiced in its ability to recover on *future* remedies, that prejudice must be weighed against the significant costs of delay in bringing such claims, the self-inflicted nature of the prejudice from its strategic decision to delay filing suit, and the obstacles that such lawsuits would themselves face.

The third Rule 19(b) factor, "whether a judgment rendered in the person's absence would be adequate," refers to the public stake in resolving controversies efficiently and this additionally favors upholding the district court's disposition of this case. Whereas a dismissal would reopen the entire controversy, the judgment of the district court would limit the dispute to one in which the remaining claims PCGG could bring against Merrill would be contingent on uncertain future events and unlikely as a practical matter to proceed beyond the pleading stage.

ARGUMENT

I. MERRILL, AS STAKEHOLDER, HAS NO ADEQUATE REMEDY IF THIS ACTION IS DISMISSED.

The absence of a "necessary" party whose interests may be impaired does not automatically compel dismissal of an action. Rule 19(b) instead requires courts to apply an equitable, rather than a legal test, considering a non-exclusive list of four factors to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Any analysis of the equities in this case must consider the fact that dismissal would leave Merrill, as stakeholder-plaintiff, exposed to multiple lawsuits with no relief in sight.

The Rule 19(b) analysis begins with the fact that "the plaintiff has an interest in having a forum" to bring "the same action, against the same parties" plus the absent party; "before trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 112, 116 (1968).[8] The absence of any alternative forum is a powerful argument against dismissal; "where a plaintiff will not have an adequate remedy elsewhere . . . district courts should ordinarily retain the case and not dismiss it pursuant to Rule 19(b)." *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash.*, 699 F.2d 1274, 1279 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.)

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[8] The fourth Rule 19(b) factor is "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4).

(quotation omitted).[9] The drafters of the Federal Rules counseled courts to "consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." Fed. R. Civ. P. 19, advisory committee's note (1966).[10]

The plaintiff's interest is especially compelling on appeal from a final judgment. "On appeal . . . [the] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage" when the "only concern" was which forum to choose. *Provident*, 390 U.S. at 110, 112. This interest is closely associated with the public interest in judicial economy embodied in the third Rule 19(b) factor; "[a]fter trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.* at 111.[11] This is

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[9] *Accord Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 90 (2d Cir. 1990); *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 497 (2d Cir. 1977).

[10] *See also* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327, 336-37 (1957) (possibility that dismissal for absence of indispensable party could foreclose plaintiff's claim entirely "is a factor which should prompt the court to proceed to a hearing and determination of the case if it possibly can do so."), *cited in Provident*, 390 U.S. at 111 n.9, as an example of commentary on the problems leading to the 1966 revisions of Rule 19.

[11] *See also Curley*, 915 F.2d at 91-92; *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1191 (3d Cir. 1979); *GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d 790, 798 (3d Cir. 1979), *aff'd*, 447 U.S. 102 (1980); 4 James Wm. Moore et al., *Moore's Federal Practice* § 19.02[4][b] (3d. ed. 2007) (after judgment "there is less interest in an alternative forum and greater public interest in preserving a valid judgment . . . even though some prejudice might result from failure to join the

especially the case in an interpleader, the entire point of which is to serve "the public stake in settling disputes by wholes, whenever possible." *Id.* at 111.

District judges have "substantial discretion" in balancing the equitable Rule 19(b) factors, and "the Rule does not call for . . . ordering [them] by rank." *Cloverleaf*, 699 F.2d at 1279 & n.11. *See also Provident*, 390 U.S. at 120-21, 126 (*citing Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-68 (1825) (Marshall, C.J.)); 4 Moore, *supra*, § 19.05 ("whether to proceed or dismiss is vested in the sound discretion of the district judge"). Accordingly, courts of appeals generally review Rule 19(b) findings under the abuse of discretion standard. *See Cloverleaf*, 699 F.2d at 1276 ("*de novo* balancing should not occur on appeal; instead, the district court's application of Rule 19(b)'s 'equity and good conscience' test should be reviewed under an 'abuse of discretion' standard.").[12]

Rule 19(b) speaks of the "remedy" available to "the plaintiff" in the event of a dismissal. The parties and the Ninth Circuit appear to assume that "the plaintiff" refers to the Pimentel Class.[13] But the logical reading of this language, in an interpleader action, is that the "plaintiff" is the stakeholder who initiates the action and seeks a discharge, rather than one of several claimants. It is the stakeholder

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absentee."); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1618, at 283 (3d ed. 2001) (A "court's concern for the expense and time that has been expended is a good illustration of the use of pragmatic considerations not specifically mentioned in Rule 19").

[12] *Accord Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F. 3d 359, 361 (7th Cir. 2004) (Posner, J.) (collecting cases); *Walsh v. Centeio*, 692 F.2d 1239, 1242 (9th Cir. 1982).

[13] *See* Pet. App. 9a-10a; Pet. Br. at 45-47; Resp. Cert. Opp. Br. at 12-13.

who files the complaint and names the parties to be joined. This is consistent with the plain language of 28 U.S.C. § 1335 (requiring "the plaintiff" to deposit the funds with the court) and Rule 22 ("[p]ersons with claims that may expose *a plaintiff* to double or multiple liability may be joined *as defendants*") Fed. R. Civ. P. 22(a)(1) (emphasis added). Lower courts have generally treated the stakeholder as the plaintiff for Rule 19(b) purposes, and this Court should do so as well.[14]

Merrill has no adequate remedy if this action is dismissed for nonjoinder due to PCGG's assertion of sovereign immunity. The Arelma assets, currently on deposit with the district court, would presumably be returned to Merrill, there being no enforceable order directing a different disposition. Merrill would be left without guidance from the courts as to the proper disposition of those assets (or who properly controls the Arelma account), and could potentially be forced – after years of litigation over a *res* in which Merrill has never claimed any interest – to defend lawsuits by the various claimants in different jurisdictions, possibly leading to inconsistent judgments. The interpleader remedy, created to resolve precisely such dilemmas, would be unavailable to Merrill unless and until PCGG chose to file suit and thus waive its immunity. Particularly given that Merrill is a mere disinterested stakeholder and no party has alleged any misconduct by Merrill, this would be deeply inequitable.

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[14] *See, e.g., AmSouth Bank v. Miss. Chem. Corp.*, 465 F. Supp. 2d 1206, 1211 (D.N.M. 2006); *Horizon Bank & Trust Co. v. Flaherty*, 309 F. Supp. 2d 178, 196-97 (D. Mass.), *appeal dismissed as moot*, 391 F.3d 48 (1st Cir. 2004); *Fleet Nat'l Bank v. Kaplan*, No. 02-11175, 2002 U.S. Dist. LEXIS 22781, at *3 (D. Mass. Oct. 11, 2002).

Petitioners do not explain how dismissal of this action could possibly provide Merrill with the relief it sought when it filed this case. They frankly assert that "the unavailability of a forum is a consequence of the Republic's immunity," and urge dismissal in favor of litigation in the Philippines. Pet. Br. at 15, 47. The Philippine court, however, has still not ruled more than seven years after this case was filed, and even if it did, it lacks the power to discharge Merrill from competing claims, and lacks the power to order distribution of the Arelma assets without confirmation of that judgment in an American court. Dismissal, as discussed *infra*, likely would result in a new interpleader action *if* the Sandiganbayan rules in favor of PCGG and *if* that ruling is upheld by the Philippine Supreme Court and *if* PCGG then files suit in the United States, thus waiving its immunity from joinder in essentially the same interpleader all over again. As this Court observed in *Provident*, this is cold comfort:

> In short, the net result of dismissal here would presumably have been a diversity action identical with this one, except that [the plaintiff] would have been *compelled to wait upon the convenience of plaintiffs over whom it had no control*, and would have been dependent upon a victory by those plaintiffs in [another lawsuit].

Provident, 390 U.S. at 127 (emphasis added).

"Equity and good conscience" do not support shifting the burden of one claimant's purposeful unavailability onto a disinterested custodian of assets that itself seeks no independent judicial relief. The federal interpleader statute, 28 U.S.C. § 1335, "is remedial and [should] be liberally construed." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 (1967). Interpleader is an ancient equitable remedy

dating back many centuries, protecting stakeholders against "the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty." *Texas v. Florida*, 306 U.S. 398, 405-06 (1939). *See also* 7 Wright, Miller & Kane, *supra*, § 1701, at 524-25. In the modern, interconnected world of global investing, interpleader is more important than ever for financial institutions beset by geographically disparate claimants. With the proliferation of investments by sovereign entities or entities with sovereign investors or business partners, or by entities that may for one reason or another come under the regulatory scrutiny of foreign governments, the potential for one claimant out of several to be a foreign sovereign within the meaning of the FSIA increases. *See* 28 U.S.C. § 1603(b)(2) ("foreign state" includes corporations majority-owned by foreign states). The test proposed by Petitioners, under which the assertion of sovereign immunity by a foreign sovereign claimant is a showstopper, would cripple the interpleader process and subject innocent stakeholder financial institutions to unfair and unpredictable litigation, uncertainty and delay.

Accordingly, the Court should prefer this litigation, however imperfect, to the complete absence of a forum for resolution of the conflicting claims confronting Merrill. In the event that the Court does not affirm the decision of the Ninth Circuit, it should not order a dismissal but instead should remand with instructions to consider the weighty equitable interests of Merrill in receiving a discharge.

II. PCGG'S SOVEREIGN STATUS SHOULD NOT ELIMINATE OR OUTWEIGH THE EQUITABLE INTERESTS OF MERRILL AND THE COURTS.

The first Rule 19(b) factor is "the extent to which a judgment rendered in the [necessary party's] absence might prejudice that person." Fed. R. Civ. P. 19(b). Petitioners argue that, where a foreign sovereign entity is the absent necessary party, that fact alone is dispositive, precluding a case-by-case examination of the nature of the prejudice to the foreign sovereign entity or a balancing of its interests against the other equitable Rule 19(b) factors. This reading of Rule 19(b) is inconsistent with this Court's decision in *Provident* and the structure of Rule 19, and reads into the Rule an exception not found in the FSIA, Rule 19 or the interpleader statutes and rules.

A. PCGG's Sovereign Status Should Not Preclude Consideration Of The Other Rule 19(b) Factors.

Because it is invoked only when an absent party is found to be necessary under Rule 19(a), the indispensable party inquiry under Rule 19(b) *always* involves some party whose rights will be affected or whose absence affects the rights of the remaining litigants, and presupposes that the equities may counsel continuing on with the remaining parties, especially if the alternatives would be worse. Thus, this Court has rejected formalistic indispensability rules, stressing that the equities relevant under Rule 19(b)

> can only be determined in the context of particular litigation . . . [and] must be based on factors varying with the different cases, some such factors being substantive, some procedural,

> some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Provident, 390 U.S. at 118-19. Petitioners' insistence that foreign sovereign immunity is always *per se* a compelling interest pretermits this fact-bound, equitable inquiry. If Rule 19(b) had been intended to "create[] a federal, common-law, substantive right in a certain class of persons" such as foreign sovereigns, it easily could have been written to do so. *Id.* at 119. Instead, the Rule provides a single standard, and courts are instructed that the four Rule 19(b) factors "*must* be examined in each case" and cannot be short-circuited by the contention that some interests have "substantive" weight as "a substitute for the analysis required by that Rule." *Id.* at 109, 118-25 (emphasis added).

Congress has nowhere granted a *per se* right to a foreign sovereign entity to quash an interpleader by its refusal to participate. Both the FSIA and the interpleader statute are complex and detailed statutory schemes, with provisions governing subject matter jurisdiction, venue, and attachment and other remedial powers. *See, e.g.*, 28 U.S.C. §§ 1330(a), 1335(a), 1397, 1441(d), 1607-1611, & 2361. The FSIA specifically precludes, in certain specified circum-

stances, attachment of assets under the sovereign's control, even to satisfy valid judgments, *see* 28 U.S.C. §§ 1609-1611, but neither statute makes any similar provision to protect the foreign sovereign entity against interpleader to resolve the sovereign's unliquidated causes of action against assets in the custody of domestic individuals or businesses. In the absence of any statutory exception to the normal operation of interpleader and Rule 19, the logical conclusion is that Congress intended that when a necessary party is absent from an interpleader due to foreign sovereign immunity, the district court should engage in the usual case-by-case balancing of the equities. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 & n.5 (2007) (declining to create "implicit FSIA exception" to rule barring appeals of remands, despite "undesirable [policy] consequences in the FSIA context," where FSIA did not amend appeal statute).[15]

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[15] Petitioners' invocation of policy considerations (Pet. Br. at 27-34) and citation to cases involving the United States or Native American Tribes ignores the distinct nature of the immunities involved. The U.S. and tribal governments enjoy sovereign immunity in U.S. courts as an adjunct to actual sovereignty, and its protections are broadly construed to effectuate the sovereign's right, in appropriate cases, to take direct executive or legislative action or to limit remedies to specially constituted tribunals. A foreign sovereign, by contrast, has no ability to assert sovereign power within the territorial United States; its immunity is a creature of statute granted by Congress as a matter of comity. The FSIA displaced the prior common law approach to such immunity, including the more restrictive approach that prevailed before 1952. *See Rep. of Austria v. Altmann*, 541 U.S. 677, 688-91 (2004).

B. A Defendant's Assertion Of Sovereign Immunity Does Not Preclude A Full Analysis Of The Practical Interests Involved.

Petitioners characterize the lower courts' examination of the practical barriers to the remedies available to PCGG – specifically, the statute of limitations applicable to any claims PCGG might bring in American courts – as itself an undue intrusion on PCGG's sovereignty. Pet. Br. at 8, 34-36, 39-40. This ignores the practical need of federal courts to conduct preliminary inquiries before dismissing a case on procedural grounds.

As a general rule, federal courts have the power to conduct basic factfinding in determining their jurisdiction.[16] Here, the district court did not require PCGG to present affirmative evidence or participate in discovery; it merely analyzed the legal issues presented on the pleadings for purposes of the practical inquiry required by Rule 19(b).[17] A pragmatic evaluation of what alternative lawsuits could feasibly be filed by the parties and what other forums remain open to hear the dispute is *always* a part of the court's "examin[ation of] the actual interest of the nonjoined person" including "the actual threat of relitigation" by the absent party. *Provident*, 390 U.S. at 116, 122. Requiring a foreign

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[16] *See, e.g., Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 704-09 (1982); *Land v. Dollar*, 330 U.S. 731, 734-35 & n.4 (1947), *overruled on other grounds, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[17] The district court took note of prior judicial proceedings, which are subject to judicial notice on a motion on the pleadings. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007).

sovereign to brief the Rule 19(b) issue in conjunction with a motion to dismiss under the FSIA is neither uncommon nor unduly burdensome and is necessary to enable the district court's informed decision on a request for the drastic remedy of dismissal of the case in its entirety.[18]

C. The Relevant Prejudice Is To PCGG's Right To Choose The Time And Venue To File Suit In The Courts Of The United States.

Much of Petitioners' argument for dismissal hinges on the premise that PCGG has an absolute right to refuse to appear in American courts. This ignores "the pragmatic consideration of the effects of the alternatives of proceeding or dismissing" required by Rule 19(b). *Provident*, 390 U.S. at 118 n.12. In fact, because the assets are located in the United States and subject to conflicting claims here, PCGG would sooner or later need to appear in a U.S. court to prosecute its claim – at which time it would waive its immunity from an interpleader. Thus, the relevant "prejudice" to PCGG's rights is not an intrusion on its right to claim the assets *without* waiving immunity, but rather on PCGG's right to choose the time and the venue to waive and pursue affirmative litigation. In weighing the equities, that interest can and should be subordinate to Merrill's right to finality and certainty and the public interest in speedy and efficient resolution of the controversy.

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[18] *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 356-60 (1993) (examining factual allegations to determine availability of exception to sovereign immunity); *Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 615-19 (1992) (same); *Robinson v. Gov't of Malay.*, 269 F.3d 133, 141 & n.7 (2d Cir. 2001) (discussing burden-shifting procedures and evaluation of evidence on motion to dismiss under FSIA).

An interpleader involving a single, disputed *res* in the possession of a disinterested stakeholder is functionally not so much a claim *against* the claimants as an invitation for all potential claimants to appear and press their case. *See State Farm*, 386 U.S. at 534-35 (where disinterested stakeholder deposits fund and files interpleader, "the fund itself is the target of the claimants" and "marks the outer limits of the controversy"). In that sense, requiring a foreign sovereign entity to choose between appearing to pursue its claim and abandoning its practical ability to recover on that claim is no more of an imposition on the foreign sovereign than compliance with any other procedural rule regarding venue, personal or subject matter jurisdiction, the statute of limitations, or the discovery rules. *Any* plaintiff in the U.S. court system, sovereign or otherwise, must abide by such rules in order to obtain relief through American courts.[19] While the FSIA gives a foreign sovereign claimant who has not filed suit a right – unavailable to private litigants – to refuse to participate, that right is not without cost: by choosing not to sue, it forgoes the possibility of recovering the assets. What the FSIA does not give foreign sovereigns is a preemptive veto over *any* litigation by U.S. litigants over assets located in the United States in which the foreign sovereign might someday come forward to claim an interest.

If PCGG were to sue Merrill to recover the Arelma assets, its appearance would waive its immunity from

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[19] This Court has previously recognized the distinction between "an attempt to bring a recognized foreign government into one of our courts as a defendant" and "a foreign government invoking our law" that "wants our law, like any other litigant, but it wants our law free from the claims of justice." *Nat'l City Bank v. Rep. of China*, 348 U.S. 356, 361-62 (1955).

related claims and expose it to the commencement of an interpleader action by Merrill, either as a counterclaim for defensive interpleader or as a separate action. *See* 28 U.S.C. §§ 1605(a)(1) (waiver exception to immunity), 1607(b) (providing that in any action brought by a foreign state in federal or state court, the foreign state waives immunity to any counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"); Fed. R. Civ. P. 22 (allowing defendant to obtain interpleader by making a cross-claim or counterclaim and stating that statutory interpleader actions under 28 U.S.C. § 1335 shall be conducted in accordance with the rule's provisions). This would follow even if PCGG sued to enforce a judgment rendered in a Philippine court. *See, e.g., Ins. Corp. of Hannover, Inc. v. Latino Americana de Reaseguros, S.A.*, 868 F. Supp. 520, 523, 526 (S.D.N.Y. 1994) (foreign claimant seeking to enforce Panamanian judgment permitted to intervene in interpleader action). An interpleader by Merrill of claimants to the disputed *res* would clearly be sufficiently connected to a PCGG suit over the same assets to implicate the FSIA's waiver and counterclaim provisions. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 491 F. Supp. 161, 166-68 (N.D. Ill. 1979) (foreign sovereign entities waived immunity from third party claims and counterclaims arising out of the same oil spill as claims brought by the sovereign entities in a multidistrict litigation). *See also Rep. of China v. Am. Express Co.*, 195 F.2d 230, 233-34 (2d Cir. 1952) (pre-FSIA case; in action to recover a deposit, foreign sovereign waived immunity from counterclaim interpleading adverse claimant to deposited funds). Accordingly, for purposes of the balancing of the equities required under Rule 19(b), PCGG is no different from a private non-intervening

litigant that chose not to participate in the interpleader action. The equities do not and should not favor such a litigant. *See* 4 Moore, *supra*, § 19.05[2][c] ("An absentee's refusal to intervene may be considered in calculating prejudice should the case proceed without the absentee.").

The fact that PCGG seeks to vindicate public interests against official corruption (Pet. Br. at 47-52) does not alter this analysis. Such aims should be accomplished through the policymaking branches of government, not through *ad hoc* rewriting of the Federal Rules of Civil Procedure. As Petitioners note, Congress has provided express authority to the Executive Branch, in appropriate cases, to obtain judicial assistance for the law enforcement efforts of foreign sovereigns in repatriating misappropriated or otherwise forfeit assets. *See* 28 U.S.C. § 2467(c); Pet. Br. at 41 n.18.[20] This mechanism, unlike a bare dismissal under Rule 19(b), provides a variety of procedural protections: a final, non-appealable judgment from the foreign court (§ 2467(b)(1)(B)-(C)), assurances that such court had jurisdiction and gave notice to affected parties (§ 2467(b)(1)(C) & (d)), and a policy determination by the Attorney General to assist the foreign government (§ 2467(b)(1)-(2)). Such procedures, if timely invoked, would presumably preempt other claims to the seized assets; certainly other claimants could not sue a financial institution

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[20] 28 U.S.C. § 2467 was enacted in 2000 as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, "to encourage international cooperation in asset forfeiture cases." Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 115-16 (2001); *see* 28 U.S.C. § 2467 (2007); H.R. Res. 1658, 106th Cong. (2000).

for complying with a district court's forfeiture order under § 2467. Nor does the text of § 2467 contemplate that the Attorney General would seek civil damages against a custodian that had disposed of the assets in accordance with a prior court order. The contrast to the consequences of a dismissal here is stark.

D. Prejudice To PCGG's Right To Sue In A Different Venue Is Limited.

To determine what an absent party will actually lose if the case proceeds in its absence, a court must look beyond the formalistic assertion of competing interests that animate Rule 19(a) and "examine each controversy to make certain that the interests really exist." *Provident*, 390 U.S. at 119. Here, that means considering what PCGG could have accomplished by suing Merrill.[21]

As the district court and the Ninth Circuit found, any claim to the Arelma assets would have to be brought in New York, the location of the *res* and of

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[21] Petitioners, citing out of context statements made by Merrill before the full extent of the dispute over the Arelma assets became apparent, contend that "had it not been for this litigation, there is every reason to believe that Merrill Lynch would have transferred the Arelma assets to the Philippines in response to a favorable ruling of the Sandiganbayan." Pet. Br. at 6 n.5 & 39-40. This ignores the fact that it was Merrill that instituted this litigation. Merrill would gladly have abided by a domesticated Philippine judicial order giving PCGG control of Arelma if there were no other competing claimants, but that is not the situation Merrill faced. With multiple parties seeking control of Arelma and its assets, guidance from a court with the ability to resolve the largest number of competing claims at once was and is essential.

Merrill's headquarters. *See* Pet. App. 8a-9a, 57a.[22] Petitioners suggest three possible causes of action against Merrill; none would provide a viable basis to survive a motion to dismiss:

1. PCGG's asserted right to the assets arises from Marcos's misappropriation of public funds, under a Philippine statute providing that "assets derived from misuse of public office are forfeit to the Republic from the moment they are appropriated." Pet. Br. at 3. Petitioners note that this statute contains no limitations period. *See id.* at 40. But this would not end the inquiry. New York's "borrowing statute" applies to time-bar claims filed in New York courts where the cause of action accrued to a non-New York resident outside of New York, if the claim would be untimely under the shorter of the New York or foreign limitations period – even when the claims are asserted under the statutory law of a foreign country. *See* N.Y. C.P.L.R. § 202 (2005); *Baena v. Woori Bank*, 515 F. Supp. 2d 414, 422 (S.D.N.Y. 2007).

The analogous limitations period under New York law would be for actions by the state "based upon the spoliation or other misappropriation of public property," for which a six-year statute of limitations begins to run upon "discovery by the state of the facts relied upon." N.Y. C.P.L.R. § 213(5).[23] PCGG discovered Marcos' misappropriation of the Arelma

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[22] Merrill will thus discuss the obstacles to recovery under New York law. Petitioners have never suggested at any stage of this case any alternative forum that would present lesser obstacles.

[23] The only alternative limitations periods would be the three-year limitations period for statutory claims and the default six-year limitations period. *See* N.Y. C.P.L.R. §§ 213(1), 214(2); *Baena*, 515 F. Supp. 2d at 422.

assets no later than 1987. *See* Pet. App. 47a. Thus, any claim under the Philippine statute would have been time-barred by 1993.

2. To the extent that Petitioners contend that PCGG could have sued Merrill on a breach of contract theory by virtue of its control of the Arelma shares,[24] such a claim would encounter at least two obstacles. First, Merrill has no contract with anyone other than the holder of the account – Arelma. Any claim by PCGG to Arelma's *assets* by virtue of its control of the Arelma *shares* is derivative of Arelma's own rights, which were adequately protected in the interpleader by Arelma's participation in the interpleader action.

Second, the New York statute of limitations for breach of contract actions is six years. *See* N.Y. C.P.L.R. § 213(2). A claim for breach of contract accrues upon the defendant's refusal to perform an obligation due under the contract, which here would be the non-payment of the Arelma assets.[25] Any claim of breach of contract thus accrued no later than July 2000, when PCGG requested that Merrill transfer the Arelma assets to the PNB and Merrill refused. CA9 E.R. 0162-65. The limitations period has come and gone and no action was ever instituted by PCGG on that demand. Petitioners cite no authority for reviving an expired limitations period by re-making the same request after the limitations period has run. *See* Pet. Br. at 40.

3. Petitioners claim that a judgment in the Philippines would be enforceable in New York courts

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[24] *See* Pet. Br. at 40-41; Pet. at 18 n.7.

[25] *See, e.g., John J. Kassner & Co. v. City of New York*, 415 N.Y.S.2d 785, 788-89 (N.Y. 1979); *State v. Fenton*, 414 N.Y.S.2d 58, 59 (3d Dep't 1979) (claim for unpaid tuition accrued when payments due).

against Merrill. Pet. Br. at 40-41. This, too, fails for several reasons. First, Merrill was not named as a party to the Philippine litigation, which is between the Republic and the Marcos estate. Section 5303 of the C.P.L.R. only allows for recognition and enforcement of a foreign country's money judgment that "is conclusive *between the parties*." N.Y. C.P.L.R. § 5303 (emphasis added). Petitioners would likewise need to show that the Philippine court had personal jurisdiction over Merrill. *See id.* §§ 5304(2) & 5305.[26]

To the extent that such a judgment is to be enforced against the assets themselves, while the Philippine court has apparently asserted *in rem* jurisdiction over the shares of Arelma, it is at best uncertain whether such assertion of jurisdiction would be recognized by U.S. courts as being over the Arelma assets, given that they were held in the United States at the time the action commenced in the Sandiganbayan. *See* Restatement (Third) of Foreign Relations Law of the United States § 421(2) (1987) (a foreign "state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if . . . the person or thing is present in the territory of the state, other than transitorily").

Thus, in the absence of the interpleader, the sole feasible options for PCGG would be to register a judgment against the Marcos estate and either seek to attach Arelma's assets as a judgment creditor of the Marcos estate (the approach taken by the

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[26] *Accord* Restatement (Third) of the Foreign Relations Law of the United States § 482 (setting forth circumstances under which U.S. courts "need not" recognize a foreign judgment, including, *inter alia*, lack of personal jurisdiction). *See also, e.g., Norex Petroleum, Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 160-62 (2d Cir. 2005); *Koster v. Automark*, 640 F.2d 77, 81 (7th Cir. 1981).

Pimentel Class), or to ask the Attorney General to initiate the forfeiture procedure set forth in 28 U.S.C. § 2467. As discussed above, either option is contingent upon a series of future events that have yet to come to pass years after the district court's judgment, and the former would trigger a defensive interpleader by Merrill. The prejudice to PCGG from its refusal to participate in the interpleader must thus be weighed not against any present alternative but against a contingent future claim – and Petitioners do not suggest any realistic alternative for what Merrill was or is supposed to do to insulate itself from the competing claims in the intervening years.

E. A Judgment Here Would Be Adequate.

The third Rule 19(b) factor is "whether a judgment rendered in the person's absence would be adequate." Fed. R. Civ. P. 19(b)(3).[27] This factor implicates "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident*, 390 U.S. at 111. Here, despite Petitioners' suggestion to the contrary, a judgment that is technically not binding on PCGG would nonetheless resolve this controversy as a practical matter. Thus, even if "[i]t might have been preferable, at the trial level, if there were a forum available in which [all the claimants] could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere" – and there was no such forum – there is now "no reason . . . to throw away a valid judgment

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[27] The second Rule 19(b) factor, "the extent to which any prejudice could be lessened or avoided" through remedial orders of the court, is not contested here; no party has suggested any protective measures to balance the competing claims or to provide a globally binding release for Merrill.

just because it [does] not theoretically settle the whole controversy." *Id.* at 116.

If the district court's judgment is affirmed by this Court or by the Ninth Circuit on remand, the Arelma assets will be distributed to the Pimentel Class, and all parties appear to agree that this cannot be undone. Even if PCGG subsequently filed suit for damages against Merrill, its claims would be barred by the obstacles set forth above; PCGG's only remedy would be to attach assets that Merrill deposited with the district court more than seven years ago and cannot get back.[28] Accordingly, the district court's judgment here is the most adequate and equitable resolution possible under these circumstances.

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[28] If the district court's judgment is affirmed, any effort to enforce a Philippine judgment in New York would then be further barred as "conflict[ing] with another final and conclusive judgment." N.Y. C.P.L.R. § 5304(5). Such a judgment would also further preclude any breach of contract action against Merrill for damages, as the doctrine of impossibility excuses a party's contractual obligation where prohibited by judicial order. *See, e.g., Organizacion JD Ltda. v. U.S. Dep't of Justice*, 18 F.3d 91, 95 (2d Cir. 1994).

CONCLUSION

For the reasons set forth above, this Court should not order dismissal of this action.

Respectfully submitted,

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